# JUSTICE 1 COMMITTEE

Wednesday 30 May 2001
(*Morning*)

Session 1

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# CONTENTS

## Wednesday 30 May 2001



## JUSTICE 1 COMMITTEE
**† 19th Meeting 2001, Session 1**

**CONVENER**

*Alasdair Morgan (Galloway and Upper Nithsdale) (SNP)

**DEPUTY CONVENER**

*Gordon Jackson (Glasgow Govan) (Lab)

**COMMITTEE MEMBERS**

*Phil Gallie (South of Scotland) (Con)
*Maureen Macmillan (Highlands and Islands) (Lab)
*Paul Martin (Glasgow Springburn) (Lab)
Michael Matheson (Central Scotland) (SNP)
*Nora Radcliffe (Gordon) (LD)

*attended

**WITNESSES**

Professor Alan Paterson (University of Strathclyde)
Mr Jim Wallace (Deputy First Minister and Minister for Justice)

**CLERK TO THE COMMITTEE**

Lynn Tullis

**SENIOR ASSISTANT CLERK**

Alison Taylor

**ASSISTANT CLERK**

Jenny Goldsmith

**LOCATION**

The Chamber

**† 18th Meeting 2001, Session 1—joint meeting with Justice 2 Committee held in private.**

# Scottish Parliament

## Justice 1 Committee

*Wednesday 30 May 2001*

(*Morning*)

[THE CONVENER *opened the meeting at 10:00*]

## Item in Private

**The Convener (Alasdair Morgan):** I formally open this meeting. Do we agree to take item 4, which is on the draft findings of our legal aid inquiry, in private?

**Members** *indicated agreement.*

## Legal Aid Inquiry

**The Convener:** Once again we have with us Professor Alan Paterson from the University of Strathclyde law school, whom we decided we wanted to give evidence again. We heard from him on 27 February. I apologise to Professor Paterson for the late start of the meeting.

We have identified one or two issues that we would like to take up with you, Professor Paterson. One is quality assurance, which has been raised by several witnesses. It has been pointed out that we lack a quality assurance system for civil legal aid, but that there are systems elsewhere. How are quality assurance systems implemented elsewhere?

**Professor Alan Paterson (University of Strathclyde):** It is fair to say that although legal aid quality assurance has been on the agenda in a number of advanced jurisdictions for some time, some have made greater progress than others have. England and Wales have made the greatest progress, and the Netherlands has shown some interest in that area, so I will talk about them.

The jurisdiction of England and Wales has been working in that area for 10 years. It started with the concept of franchising. Basically, solicitors who got franchises were required to deliver a better quality service, which was measured and defined in a variety of ways, in return for advantages. One can measure quality, and the English have done it in three ways.

The first thing that can be measured is input. That is the easiest to achieve, but it is also furthest away from the delivery of quality. Nevertheless, it is important, and includes such things as the qualifications of staff, having effective supervision mechanisms for junior staff and qualified staff, having a good business plan, cost control, financial management, strong internal file review, practice management standards and general standards. Those are all important measures of input, but they have only limited impact in ensuring that the quality of work meets the standard that has been set.

The next set of measures is process measures. The English use measures that are called transaction criteria, which are similar to checklists and work on the basis of file review. The auditors examine a random selection of legal aid lawyers' files and check those files against the checklist of tasks that the auditors would expect to have been done in a case of the type to which the file relates. Those matters are specified in some detail; a checklist can contain 100 items or more. The lawyer does not have to get 100 per cent right, but a figure of about 65 per cent must be obtained. If

enough files do not meet the target, the auditors will take a second trawl of the files. If that fails, the auditors will consider further measures.

The problem with process measures is that although they show whether people are doing the right things and doing what would be expected, they do not show whether the right advice has been given. To discover that, we must consider outcome. Such matters as cost or client satisfaction can be considered. However, client satisfaction measures are good at giving us only some information about quality. They tell us whether the lawyer is good at handling clients, relates well to them, communicates well with them, shows empathy and appears to respond quickly to requests from clients. All those matters are important to service, but on key issues such as whether the lawyer obtained the right result for the client, whether the lawyer achieved that in the appropriate time and whether the cost of the case to the client was reasonable, the client cannot answer without having information given to them by the lawyer. Therefore, the lawyer can influence the client's interpretation of the result. Client satisfaction measures only part of quality.

How can the result be measured? That is tough. The measures that have been used in England and Wales, which I helped to develop as part of a team, are peer review and mystery shoppers. Peer review involves file review by peers who are trained in the matters with which the file deals and who have worked together on a set of agreed criteria for measuring or assessing such files. Such people were sent into firms in England and Wales, and we found that we could obtain some consistency in the results that were achieved.

We agreed with legal aid practitioners that, as part of the contracts that those practitioners received from the Legal Aid Board, which is now the Legal Services Commission in England and Wales, they would occasionally receive a mystery shopper—a client who would present with a problem and who would not be genuine. That client would come from the researchers and measure how well the practitioner dealt with the problem. The Dutch have used that technique to measure the quality of general practitioners in the Netherlands and the technique has also been used in a variety of service sectors.

The Dutch have used a lesser set of measures and have concentrated and restricted legal aid more to allow people to do legal aid work only if they are prepared to do a set amount. The Dutch have considered some of the measures that the English have adopted and might take them further.

**The Convener:** That all sounds fairly expensive, but perhaps I am wrong. Have you any idea what compliance costs the measures impose on suppliers of civil legal aid?

**Professor Paterson:** No, but I think that you are right that the system is expensive. Input measures are the least expensive. The Scottish Legal Aid Board has introduced some input measures, particularly on criminal legal aid. However, as I said, such measures bite least.

On process measures, transaction criteria have been quite expensive to implement and audit. There might be ways of making those criteria less expensive, and the Legal Services Commission is investigating that. Peer review is so expensive that one simply would not use it as the primary or standard method of quality assurance. Instead, one would use it as an appeal mechanism or as a checking mechanism.

**The Convener:** You mentioned franchising, and I presume that some method of quality control is essential if a significant proportion of the operation is to be franchised out. Is it suggested that people who obtain franchises do so on the basis of their quality, their price or simply on their willingness to do the work?

**Professor Paterson:** Franchising has given way to contracting, but it was a form of contracting. Contracting in England and Wales is exclusive—in other words, one cannot provide legal aid services, such as giving advice or assistance, unless one has a contract from the Legal Services Commission. Firms must bid to do that work, but, at present, they do not bid on the basis of price.

Observers have feared for more than 10 years that the Treasury might look towards competitive tendering as a way of allocating contracts in England and Wales. That was one reason why the Legal Aid Board and the Legal Services Commission were so keen to ensure that quality measures were in place and that there was a quality floor below which competition could not drive practitioners.

**The Convener:** If people do not bid on the basis of price, on what basis do they bid?

**Professor Paterson:** They bid to do so much work—the price is more or less set for them by the Legal Services Commission. However, we might well reach the stage at which people will be expected to compete on price. In order to get a contract, one must show that one meets quality assurance standards, including the input standards that I mentioned—a strong supervisory structure, strong cost controls, file review and practice management—as well as compliance with the transaction criteria.

**The Convener:** Do certain firms not get that work after bidding for it?

**Professor Paterson:** Yes.

**The Convener:** On what basis do those firms

not get that work, while other firms get it?

**Professor Paterson:** I do not have the figures on which firms did not get contracts. The process, which has been implemented over the past year only, is continuing. Certain firms did not get franchises, but at that time, one did not have to have a franchise in order to do legal aid work, so the problem was not so great. A firm would not get a franchise if it could not meet the input standards that were required. Most people who underwent the process of trying to acquire a franchise found it a valuable experience, because they were asked to implement sound business practices, which, to be frank, the legal profession should have been—and many firms had been—implementing for a while.

**The Convener:** That leads me to my next question. It has been suggested that we do not need such a system in Scotland because the quality of solicitors' work is guaranteed by their training, codes of conduct and so on. Is that assertion justified?

**Professor Paterson:** It might be justified—we simply do not know.

There is no evidence as to the quality of work that is done by solicitors or advocates in legal aid in Scotland. If you like, that is where the pressure comes from. Substantial amounts of public money are spent on legal aid. In other areas on which large sums of public money are spent—such as schools, higher education or health—it is accepted that quality assurance measures must be in place in order to show that the money is being spent and that value is being achieved. There are no equivalent measures in relation to legal aid spend.

The Law Society does have a requirement that all its members provide an "adequate professional service". However, when it comes to identifying such a service, the Law Society, for understandable reasons that I do not share, has always been reluctant to identify what an adequate standard is. The Solicitors (Scotland) Act 1980 does not help, because it refers simply to

"services which are in any respect not of the quality which could reasonably be expected of a competent solicitor."

What are the standards that could be expected of a competent solicitor? We are looking to the Law Society to identify them. The Scottish Legal Aid Board and—if there was one—a legal services commission would undoubtedly want, in their pursuit of value for money, to say what they regarded as an adequate legal service and to have that monitored.

10:15

**The Convener:** Paul Martin has some questions about a legal services commission.

**Paul Martin (Glasgow Springburn) (Lab):** When you previously appeared before the committee, we discussed your proposal for a legal services commission. You urged that such a body should have flexibility. What exactly do you mean by that?

**Professor Paterson:** It is not just about flexibility. The commission should have a planning and proactive role. The current board has its hands tied by legislation. It does not have a planning role. It cannot say how a pot of money should be spent. Its statutory role is to be a good housekeeper—to manage the fund. The board is demand led—everything depends on who comes to it for money. The board cannot say that it has examined need and provision in Scotland, that it has identified certain gaps and that it would like to fill them. It is within the board's role to carry out an assessment of need and to examine the availability of supply. However, it has no statutory powers to fill gaps that have appeared.

The English Legal Services Commission has such powers. Its role is to identify gaps and to say what priorities need to be addressed. The commission develops those priorities in conjunction with the Lord Chancellor's Department and suggests ways in which gaps in provision can be filled.

Best practice around the world in advanced jurisdictions is to have a complex, planned mixed model. We do not have a planned model, we probably do not have a complex model and we barely have a mixed model, because we have very few salaried lawyers. In the jurisdictions that can give us a lead, there is a strategic balance between the private profession, which still does the bulk of the work, salaried lawyers employed by the commission, law centre lawyers and the not-for-profit sector. Each has a role to play. The commission then experiments. It asks itself what sort of provision is best suited to a particular operation.

Last night, I examined the strategic plan of Legal Aid Ontario. It is considering how the internet can best be used to deliver legal services in rural areas. It is experimenting with pilot projects in relation to what it calls expanded duty-counsel salaried lawyers, in relation to immigration and in relation to youth courts. It can tailormake pilot projects in particular areas to meet needs that have developed in relation to asylum seekers, for example. We cannot do that. Our board does not have strategic powers or a policy-making role. A legal services commission would.

**Paul Martin:** Do you think that a legal services commission should be able to revise eligibility criteria or fee levels?

**Professor Paterson:** The Legal Services

Commission in England and Wales is partly involved in that area, although decisions are still made by the Lord Chancellor's Department. Recently the commission proposed that solicitors working in areas of priority need—such as social welfare law—should be paid more. I believe that that proposal has now been implemented. I think that that is a sensible approach, as it enables one to say, "These are our priorities, which have been agreed between the commission and the Lord Chancellor's Department." One can then reward providers who are prepared to work in those areas of legal aid.

**Paul Martin:** Do you believe that a Scottish legal services commission could consider such issues as eligibility and fee levels?

**Professor Paterson:** A Scottish legal services commission could have a role in that. The English Legal Services Commission has a research arm, as does the Scottish Legal Aid Board, but the English Legal Services Commission research arm has been looking at eligibility, the question of passporting benefits and other issues that have been troubling the committee. The results of the research will have to be with the Lord Chancellor's Department if they are to be implemented, but the commission has had a key role to play.

**Paul Martin:** Evidence has been given to us that suggests that many aspects of the legal aid system are in need of revision. Should there perhaps be the opportunity for an on-going strategic review?

**Professor Paterson:** Absolutely. The balance of policy making between the Executive and the commission would have to change, and that is sensible. One cannot take all policy-making powers away from the Executive. After all, it is the paymaster at the end of the day. However, the commission should be doing a lot of the strategic planning in conjunction with the Executive.

**Paul Martin:** Finally, would you like to make any further points that have not been covered in your written and oral evidence?

**Professor Paterson:** I think that I have covered most points.

**Phil Gallie (South of Scotland) (Con):** Some oral evidence has suggested the need for a rationalisation of eligibility criteria in terms of passporting benefits with respect to advice and assistance and civil legal aid. What is your view on that?

**Professor Paterson:** That is an area that the English Legal Services Commission has been looking into. Rather curiously, as I understand its interim results, it is not in favour of extending passporting across the board. In fact, it is considering getting rid of it. That is curious because, on the face of it, passporting saves on administration costs. However, the commission's microeconomic modelling suggests that it does not increase the range of people who benefit from the scheme. The commission is concerned that it brings in a number of people who, under the current rules, are ineligible for legal aid. The commission thinks that that is a problem. I am not sure that I agree with that, but research has certainly been conducted in that area.

I can see the argument for saying that the eligibility test for advice and assistance, assistance by way of representation and legal aid should be the same. That looks like a tidy approach. However, one could equally take a different approach. One could say that advice and assistance is more important than legal aid in a sense. Research that has been done by Professor Hazel Genn of the Nuffield Foundation, in which I have been involved, has shown that what is needed is quick, early intervention. Strong, competent advice at the earliest stages is needed to head off developing problems. As Professor Richard Susskind said, what is needed is a fence at the top of a cliff, not ambulances at the bottom.

On that basis, it would be quite logical to put more money into, and increase eligibility for, advice and assistance, on the ground that one wants to get the early diagnosis right first off. One might therefore choose to make eligibility stronger and wider in relation to advice and assistance than in relation to representation. I am just saying that one can construct an argument for doing it that way.

My personal view is that we have to examine the whole issue of eligibility because—this cuts against my earlier argument—we have lost the middle-income sector that used to be covered by legal aid. That is unfortunate. As I suggested when I gave evidence on a previous occasion, I would like the Executive—or a legal services commission, if we had one—to look at other ways in which people on middle incomes could be brought back in.

I say that for two reasons. There is evidence from other jurisdictions that, if something is widely available in a society, it is more valued and supported by the society as a whole. For example, Norway has consumer legal aid that is widely available to consumers and is very popular. Because it is not restricted to only a small sector of the community, it attracts much popular support.

The other argument is that, at the current juncture, people who are just outside the legal aid limits simply cannot afford to litigate in many cases. That seems to me to be unfortunate. I would like us to explore ways of bringing the middle-income people back in, even if that means that, in effect, the contribution that is given is 100

per cent.

**Phil Gallie:** You seem to be suggesting that there is some injustice in the civil legal aid scheme, which has pushed the thought into people's minds that civil law is for the very poor and for the very rich—those who are in the middle miss out.

Further to that, you mentioned a commission, on which you have already answered some questions. Surely, now that we have a Scottish Parliament and many more members of Parliament, that would be Parliament's job. Why do we need to pass on responsibilities to yet another outside body?

**Professor Paterson:** The commission would not co-exist with the Legal Aid Board. It is likely that, as in England and Wales, the Legal Aid Board would be transformed into a legal services commission, which would do much the same job that is currently done by the Legal Aid Board but would have a wider remit. It would cover planning and policy and would manage the fund and the proper delivery of poverty legal services in Scotland.

I do not think that the Parliament would want to spend its time planning the proper delivery of poverty legal services, even if it could do that only once a month. The commission would do that, but the key decisions can still be made by the Executive and by the Parliament.

**Phil Gallie:** I want to return to the fairness of civil legal aid. If awards are made against people who are on civil legal aid, any awards that should be paid to others seem to be swallowed up by the Legal Aid Board itself. Only if there is any residue after the Legal Aid Board has got its money does the individual who has successfully taken a case through the courts get anything.

Also, is it fair and right that, even if the court makes the other party responsible for the costs, the costs of the successful individual are not met? That happens on the great majority of occasions. Should that be changed?

**Professor Paterson:** I understand that you are referring to the clawback or statutory charge, which is a feature of many legal systems. In effect, it works in this way: if a person loses the action, the legal aid is considered to be a grant; but if the person wins the action, it becomes a loan, which someone has to pay back. The loan should be paid back by the other side, but it is usually not paid back in full for a variety of reasons. Therefore, the Legal Aid Board will look to the litigant who was given legal aid to pay it back from contributions. Usually, the contributions will not cover the legal costs, so the board needs to look to any winnings that have been achieved. I can see the Treasury's rationale in doing things in that way.

However, two things should be said. First, the first £2,500 is disregarded for the purposes of clawback. That is not big enough. It has not gone up in six or seven years or more and should have been uprated. Secondly, members of the public simply do not understand that that is what will happen. It is also fair to say that some members of the profession do not understand how the charge works. Members of the profession, therefore, occasionally appear to be willing to accept that the other side will not pay any expenses—or pay only limited expenses—without realising that that will have the knock-on effect that their client will pay the charge. That does not happen routinely, but it happens from time to time because some members of the profession—as with members of the public—find the charge difficult to understand.

**The Convener:** You spoke earlier about a possible case for a 100 per cent contribution for higher up the income scale. Were you suggesting that that would protect against the costs that you have been discussing?

10:30

**Professor Paterson:** No. You may ask why anybody would pay a 100 per cent contribution. The answer is, first, that the contribution can be spread over a substantial period—some jurisdictions have experimented with contributions being paid over a very long period indeed. Secondly, some people say that the real advantage of legal aid is that, when people lose, their liability to pay the other side's expenses can be, and usually is, modified by the court, even if they have to pay 100 per cent of their own lawyer's fees.

**The Convener:** You suggested that the state should pick up 100 per cent of fees higher up the income scale than it does at present. Would you suggest that that be extended to all costs?

**Professor Paterson:** No—I may inadvertently have misled you. When I talked about 100 per cent contributions, I meant clients paying up to 100 per cent of the contribution. The sliding contribution scale would mean that, after a while, clients would be paying 100 per cent of their costs, or rather of their contribution. They might do that, first to spread out the contribution over a longer period and, secondly, because if they lose, their liability to pay the other side's expenses may be modified by the court.

**Phil Gallie:** You mentioned that the amount of money that is disregarded has not been updated for a number of years; neither have the rewards for advocates and solicitors participating in the schemes. You stated that there is some concern about that. How could and should the fees be

updated and subsequently maintained at an acceptable level?

**Professor Paterson:** It is true that there have not been annual increases in fees for advocates' or solicitors' legal aid work. If I were a Treasury official, or the Scottish equivalent thereof, I would say that it is interesting that the unit cost per case keeps rising year on year. In other words, cases cost more each year, despite the fact that fees have not gone up.

The Dutch froze legal aid fees to advocates and solicitors for 10 years. I am not saying that theirs is a model to be followed, but the net result was that there was negotiation and the relevant Dutch minister said to Dutch advocates that the Government would increase legal aid fees, but wanted something in return: quality assurance. I am not surprised; if I were in the Scottish Executive and solicitors and advocates approached me wanting more fees, I would probably say that I would like some movement on the quality assurance front.

There is also an argument for considering the disincentives that some of the fees introduce in relation to social welfare law. Social welfare law largely involves advice and assistance and now ABWOR in relation to appearance before tribunals. However, the restrictions on the fees that may be obtained for advice and assistance are considerably higher than the restrictions on civil legal aid. Preparation time is limited, there is no research time and travel time is limited. That means that because most of social welfare lawyers' work is done under advice and assistance, they are in effect paid much less than civil legal aid lawyers, who themselves would say that they are not paid particularly well. That sort of penalty should be examined. Nobody planned it but, for historic reasons, most social welfare law comes under advice and assistance rather than full civil legal aid. In a well-planned system, that situation should be avoidable.

**Phil Gallie:** You say that the unit cost of cases has risen. If solicitors' and advocates' fees have stayed on a straight line, would not it be fair to argue to the Treasury that the rise is due to increased Crown Office court costs rather than solicitors' and advocates' fees, although that is not an argument against reconsidering their fees? Solicitors' and advocates' expenses have gone up, but their fees have stayed on a straight line. Are you suggesting that solicitors and advocates are somehow extending the system so that they can earn more?

**Professor Paterson:** I am not aware of research to show why the unit cost has risen; I merely observed what a Treasury official would observe—that although fees are pegged, the unit cost keeps rising. Why the unit cost keeps rising is an interesting question and more research is required. The allegation that some of the rise is caused by lawyers cost chasing is easy to make but it has not been substantiated. I believe that the supplier-induced demand thesis, which some economists espouse, is an easy one that is not fully borne out by the facts. Economists have considered the matter in England and Wales. It is true that lawyers are economically rational—in other words, if you give them an incentive to work one way, they will work that way and if you give them an incentive to work another way, they will work another way. The allegation that solicitors or advocates are inflating their fees is not one that I would make, nor do I think that the facts would bear it out.

**Phil Gallie:** I did not make that allegation, but it is a logical conclusion to draw. If their fees are on a fixed line, they cannot affect the overall unit cost of cases. Their fees would be excluded.

**Professor Paterson:** That assumes that the same amount of work was done in previous cases as is done in current cases. It may be that changes in the law or in procedure mean that more work has to be done.

**The Convener:** I do not want to put words in your mouth. I accept what you say about higher payments perhaps being needed in some areas, especially for advice and assistance in social welfare cases, to try to encourage people to go in that direction.

In your original evidence to the committee, you said:

"in my opinion, civil legal aid is certainly under-remunerated in Scotland."—[*Official Report, Justice 1 Committee,* 27 February 2001; c 2195.]

Is that the same as saying that civil legal aid practitioners are under-remunerated, or are you just saying that certain areas are under-remunerated?

**Professor Paterson:** My answer is both. The question of what is an appropriate level of fee turns on our expectation of what is a reasonable salary. I cannot answer that—what the state is prepared to pay legal aid practitioners is a question for policy makers. From my discussions with civil legal aid practitioners, I am persuaded that, by and large, the fee rates for civil legal aid practitioners in Scotland are, across the board, on the low side. In particular areas, such as social welfare law, people labour under a particular disincentive, because it predominantly involves advice and assistance.

**The Convener:** You say "on the low side", which is a fairly measured comment. One of our witnesses described the legal aid system as being at "the stage of meltdown". Was that an exaggeration?

**Professor Paterson:** I am not sure that I am prepared to comment on—

**The Convener:** I presume that, if it is at the stage of meltdown, next week we will see no civil legal aid cases.

**Professor Paterson:** Scottish Legal Aid Board research is mapping provision and considering the number of outlets and the number of solicitors that provide advice and assistance. The figure has gone up in the past seven years. The board has also looked at the number of lawyers doing civil legal aid; that figure, too, has gone up in the past seven years. Therefore, to say that no lawyers are willing to do civil legal aid work is not true. However, to say that there are disincentives to their doing civil legal aid work is true, and I am not sure that that is a good thing. What we do not yet have from research—although we hope to get it—is evidence on whether people who used to do a lot of civil legal aid are no longer doing it.

**The Convener:** If I were the Treasury official looking at the system and I heard that more practitioners were coming forward, I would ask why I should pay them more when I was getting more volunteers at the current rates.

**Professor Paterson:** We do not know who is doing the work or how much they are doing. Something like 75 per cent of civil legal aid work is done by 25 per cent of the profession. A similar picture prevails in England and Wales. The English have concentrated resources on that 25 per cent. By and large, the franchises and contracts have gone to those people, on the argument that specialists in legal aid will be more committed to the system and will have more throughput, which means that there will be a greater economy of scale.

**The Convener:** I thank you for your evidence, Professor Paterson. It has been helpful.

## Subordinate Legislation

**The Convener:** We have before us a negative instrument, the European Communities (Service of Judicial and Extrajudicial Documents) (Scotland) Regulations 2001 (SSI 2001/172). Are there any comments?

**Phil Gallie:** The first document seems to be fairly meaningless and states the expected. Is not this a case of legislation being created for the sake of it? We have before us a statement that no one can possibly argue with. I do not see the point of it.

I would like to ask a couple of questions about the second document, as it relates to languages and translation. A range of languages is quoted. Does each document have to be translated into each and every one of them or would it be only into the language of the country to which the documents are to be transmitted? Who is responsible for the costs of the translation and for ensuring its accuracy?

**The Convener:** By "the second document", do you mean the Council regulation to which the instrument refers?

**Phil Gallie:** Yes.

**The Convener:** We can ask the Executive those questions. I suspect that a document that was served in Scotland would have to be in English, but I think we can find that out for you.

**Phil Gallie:** That would be useful. I have no comment other than that the document is a waste of space.

**The Convener:** If there are no further questions, we will take no action on the instrument other than to write to the Executive to ask about the points that Phil Gallie has raised.

As was previously agreed, we will take item 4 in private.

10:42

*Meeting continued in private.*

11:06

*Meeting continued in public.*

## Draft Freedom of Information Bill

**The Convener:** Agenda item 5 is the draft freedom of information bill. We are joined by Jim Wallace, the Minister for Justice, Michael Lugton, head of the Executive constitutional policy and parliamentary liaison division, and Keith Connal, head of the Executive freedom of information unit. I invite the minister to say a few words of introduction.

**The Deputy First Minister and Minister for Justice (Mr Jim Wallace):** I thank the committee for its invitation to give evidence on our draft freedom of information bill. The convener welcomed the officials who are with me today, who gave evidence to the committee on 16 May. I shall try to keep my opening remarks brief, so that we can take up the time with questions.

As the committee is aware, on 1 March I published the draft freedom of information bill for consultation and pre-legislative scrutiny. That followed from our earlier consultation on proposals for freedom of information, which were set out in "An Open Scotland". From the earlier media reporting, the debate that was held in the Parliament on 15 March and the consultation responses that have been received so far, it is fair to say that the draft bill has received a reasonably warm response. Of course, there are aspects of the bill about which we have received some critical comment, and we will consider those areas carefully before we prepare the bill for introduction later this year.

I accept that the draft bill is, necessarily, a little complex in places, but it sets out a clear right of access to information that is held by a wide range of Scottish public authorities. It contains a duty to disclose information unless that information is covered by a limited number of exemptions; a requirement, in all bar a few circumstances, to consider the public interest in disclosure; and a rigorous appeal system with a fully independent and powerful Scottish information commissioner, to be appointed by the Parliament, to promote and enforce the legislation.

Complementing those core components, the bill contains provisions on other matters such as charging, when the charges are not already covered by statute or in a publication scheme; the means by which applications for information can be made; response times; publication schemes; and the way in which it is proposed to apply freedom of information to public records.

The draft bill, if it is enacted, will introduce a distinctive, robust and effective statutory freedom of information regime. At the same time, it is practical legislation that recognises the need to have a workable freedom of information regime that does not place unreasonable burdens on Scottish public authorities.

I am sure that the committee has recognised that there is a lot of detail in the 72 sections of the draft bill. I look forward to the bill receiving detailed consideration during its passage through Parliament, but at this pre-legislative stage, I am happy to discuss any general aspects of policy or to try to answer any detailed questions on provisions in the draft bill.

**The Convener:** Thank you.

In the original consultation paper, three possible types of charging scheme were suggested. Can you expand on why you opted for the scheme that you have chosen?

**Mr Wallace:** Under the scheme that we have chosen, requests for information will be free up to £100. Thereafter, the balance will be met. In other words, if a request cost £200, the authority could charge £100. There would be an upper ceiling of approximately £500. That was the second option in the consultation document and it was chosen because it received the most support from consultees.

We might say that that was genuine consultation. However, it was not just a matter of putting out the proposals and doing a head count. We believe that our proposal strikes the right balance between encouraging access to information and ensuring that public authorities do not have to use up resources—often valuable resources—and divert them away from their principal business.

You may recall that, when we debated the issue in March, I indicated that we would review our charging proposals in the light of any further responses to this phase of the consultation.

**The Convener:** I suspect that there would be a problem with any charging scheme, in that the less efficient a body is at storing its information, the more expensive it will be to retrieve that information. As a result, authorities that are better at storing information will be able to provide the same information much more cheaply than will those that are poor at storing information.

**Mr Wallace:** If the position were that simple, that would be a fair point. However, as part and parcel of a general move to improve record keeping, there would be a code of practice on records management. Our expectation, therefore, is that all public authorities would improve the way in which they hold their records and that

considerable divergence should not arise in efficiency of record keeping between public authorities.

I have established a working party, which has representation from all Scottish Executive departments and from public authorities beyond the part of the Executive that is under immediate ministerial responsibility. We are addressing the issues of how different departments and public authorities should prepare themselves for freedom of information. It is, therefore, more than our expectation that public authorities would keep records in a way that would ensure that the kind of divergence that I mentioned did not take place.

In addition, once the freedom of information regime has been established and the Scottish information commissioner is in place, the commissioner would have an important role, not just in determining individual cases, but in overall policing of the scheme. An important part of that role would be ensuring that public authorities keep their records efficiently.

**The Convener:** Excuse me if the information is contained in the consultation document, but I presume that, if the search was going to cost £300, for example, the authority would advise the client before proceeding and give them the option to withdraw at that stage. It would not be a case of someone asking for information and then getting a bill for £399, or whatever it cost.

**Mr Wallace:** That is right. Anyone who requested information would be told how much it was going to cost.

**The Convener:** What would happen in exceptional cases, for example with people who require information in some medium other than the printed word? I am thinking particularly of people who have various kinds of sensory impairments.

**Mr Wallace:** My officials have been engaged in some discussions on that matter. An obvious example would be Braille. Obviously, we are alert to the issue and have tried to address it. There may well be existing statutory obligations that public authorities would be obliged to follow, but the legislation is not intended to impose further statutory requirements. It would be understood that applicants could express a preference for information to be provided in a specific format and we would expect the public authority to try to do that, if it were reasonably practicable.

As I indicated, we have met some of the equality bodies—the Equal Opportunities Commission, the Disability Rights Commission and the Commission for Racial Equality—to discuss the issues. We will certainly consider with those bodies—we will also consider any of the committee's recommendations—how we can best deal with such a fair and important point.

11:15

**Phil Gallie:** Currently, people seek information from local authorities and that information is obtainable. Under the charging scheme, will people pay twice in some cases? They will pay their local rates and will have to pay additional charges for statements on what has been done.

**Mr Wallace:** To put that question into context, the overwhelming majority of requests would cost under £100 and would therefore be free. If a request costs more than £100, it involves a considerable amount of work. A balance must be struck to achieve value for money for the taxpayer. If the request would involve a considerable amount of time and effort on the part of the local authority—on photocopying, for example—some charging would not be unreasonable. Of course, charging will be discretionary. It will always be open to the local authority to waive a fee in a particular circumstance.

Furthermore, publication schemes will be part of the overall scheme. Again, those schemes will be overseen by the information commissioner. We will encourage public authorities—including local authorities—to come forward with the information that they were going to put in the public domain anyway. Some information may be made available free of charge—for example, the information that accompanies every demand for council tax. We want to improve the quality of information, and we will look to public authorities, including local authorities, to make other publications available.

**Phil Gallie:** There will be no competition when it comes to the cost of providing the information—there will be only one source. Will detailed statements be given on the costs that are incurred, particularly if they are substantial?

**Mr Wallace:** It would not be satisfactory to spend a lot of time on producing a detailed scale of charges. That could be costly. The important backstop is that, if the applicant is not satisfied, he or she can apply to the information commissioner who will have full powers to review the case. The commissioner would take a pretty dim view of authorities that were trying to manufacture costs, as it were, to frustrate the provision of information, although there is no reason to say that they would do so. Once the information commissioner is in place and a number of cases have passed through his or her hands, the public authorities will no doubt get the message about what charging is reasonable and what the commissioner will not allow. If an applicant believes that there has been an incorrect or unfair calculation, a right of appeal will exist.

**Phil Gallie:** What about MSPs and MPs? We seek a lot of information from public bodies and others. Will that information be provided to us

without our incurring costs?

**Mr Wallace:** In making applications, MSPs and MPs will be in the same position as anyone else. Of course, it will still be open to MPs and MSPs to ask parliamentary questions. MSPs can have access to Scottish public authorities' information through that route. We still have section 23 of the Scotland Act 1998 as the ultimate nuclear sanction, if you want to call it that.

**Phil Gallie:** That might be the case, but MPs and MSPs can have good relationships with public bodies and they get information from them. I recognise that, at times, we impose burdens on public bodies, but we do so in the interests of constituents. Generally, the information that comes back is helpful to those constituents. Asking parliamentary questions is one thing, but you say that MPs and MSPs will, in effect, be charged in the same way as everyone else, and that seems to be a step back for the interests of constituents.

**Mr Wallace:** There is no intention that that should happen. The cost would fall under £100 in the overwhelming number of cases. I repeat that public authorities have the discretion not to charge. Phil Gallie would probably find that a dim view would be taken and that questions would be asked in Parliament if it were thought that public authorities were trying to use the scheme to frustrate MSPs in the legitimate discharge of their functions.

When I was in New Zealand, I discussed the provision in that country with the Minister of Justice there. He said that Opposition MPs were pretty adept at using the freedom of information provisions. I look forward to this with some interest.

**Phil Gallie:** What worries me is when I am not in opposition.

**The Convener:** We are considering only the immediate future, Phil.

The request for information has to be made in writing or by e-mail, or some such form of electronic communication. I presume that that does not preclude somebody from turning up in person and completing a simple form at the reception area.

**Mr Wallace:** That is correct.

**The Convener:** More important, will not it be possible for people to make a request by telephone? People can get a personal loan or their car insurance by telephone; such calls are recorded.

**Mr Wallace:** The draft bill does not exclude the possibility of telephone applications, but we took the view that for the system to work most effectively, it would be far better for applications to be made in writing. Telephone applications are not excluded, but we must take into account issues such as dates and the time to respond. It would be better to have an application form.

We have tried to make the application process as simple as possible. All that the applicant has to do is to make an application in writing. We hope, and the expectation is, that officials would want to be as helpful as possible. If somebody phoned up, I cannot see there being anything wrong with a way being devised of putting the application in written form so that several important steps in the process can be followed through.

Section 15 of the draft bill includes a duty to assist, which I hope would resolve such issues.

**The Convener:** Does the application have to be made in English?

**Mr Wallace:** Prima facie, yes, but we have been examining that requirement with the CRE. We could consider a translation being done if a request was made in a language other than English. That is a reasonable point.

**The Convener:** I am thinking about the European convention on human rights, which provides that there should be no discrimination in the right of access to information.

**Mr Wallace:** I would not want people who were not very familiar with English, or who may even have no written English skills, to be frustrated in a legitimate attempt to get information.

**Gordon Jackson (Glasgow Govan) (Lab):** Information is defined in the draft bill as "recorded"; it is not defined as information held. What about information that is held, but unrecorded?

**Mr Wallace:** The bill gives rights of access to unrecorded information. I draw your attention to section 1(1), which says:

> "A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority."

The words "which holds it" are relevant in this context. The commissioner would be able to make inquiries about any recollections of unrecorded information. It is difficult to think of all the ways in which the information might be held. It might be on video, for example.

**Gordon Jackson:** I will press you on what you understand by "information held". My understanding of that would be information that was recorded, as in the famous phrase "held on file".

The worry at the back of people's minds is that, in trying to produce a culture of openness—of

which, as you know, I am a great supporter—we might produce a culture of people not writing anything down because they might have to tell people what they wrote. At the moment, if people produce a minute of a meeting, it will not necessarily end up in the public domain.

**Mr Wallace:** The word "held" suggests that there is a corpus of information somewhere. It would be difficult to say that information that was retained in someone's brain was held by a department. The definition section of the bill says that information

"means information recorded in any form".

That is a pretty wide definition; it would be difficult to make it wider than that.

The experience of other countries that operate freedom of information regimes is that there has not been a great rush to stop putting things in writing. That is not to say that that will not happen, but the nature of the system is such that not writing things down would create more problems than it would avoid. I know that it is sometimes said that the Post-it culture could take over. However, when I was in Ireland, there was a suggestion that the freedom of information regime might cause recording to improve.

As I indicated earlier, if someone appeals to the commissioner and an inquiry is undertaken, the commissioner can seek unrecorded information by interviewing officials to find out what their recollections are.

**Gordon Jackson:** I accept that we could not have freedom of information without having some exemptions, but a number of forms of exemption are proposed in the draft bill. Some people wonder why class exemptions—a presumption against disclosure of certain classes of information—have been included. Why would not the substantial harm test be good enough for every circumstance? Why must certain pieces of information be put in classes of their own?

**Mr Wallace:** That has been one of the theological debates, if you like, whenever freedom of information proposals have been introduced. We took the view that a class exemption would apply to situations in which there was a presumption that there would be substantial harm in disclosure. It is important to make clear what sort of information would usually be available. The class exemptions lend themselves to that kind of categorisation. It would be regrettable if we were to produce an expectation that was not met in reality. It is important to emphasise that the public interest test will continue to apply in nearly all cases. There is provision for an appeal to the commissioner if the applicant is dissatisfied.

11:30

**The Convener:** The public interest test does not apply to everything, does it?

**Mr Wallace:** There is not much to which it does not apply. You will find the details on page 33 of the draft bill. Some of the class exemptions are technical. There may be a statutory prohibition on releasing information, or information may be about to be released in the ordinary course of events. There are very few absolute exemptions. Another technical exemption is that applying to information that is otherwise accessible. There may also be a prohibition on disclosure in another statute.

Another exemption relates to personal data, which would come more appropriately within the ambit of the Data Protection Act 1984. We added an exemption that was not in the original consultation document, relating to personal census information. It was important, during the recent advertising of the census, to reassure people that their confidentiality was guaranteed for 100 years. There is also an exemption for health records. All the exemptions in the bill are self-evidently sensible.

**Nora Radcliffe (Gordon) (LD):** Friends of the Earth, in its draft submission on the draft bill, asserts:

"The current proposals entail a twin-track system where environmental information continues to be governed by the Environmental Information Regulations"—

which are based on European law.

The organisation suggests that environmental information would not come within the ambit of the bill. Will you comment on that claim? I would have thought that all environmental information would be accessible through public bodies.

**Mr Wallace:** Our aim was to help make available environmental information. There is a European Union primary directive on access to environmental information. In June 1998, the UK also signed the Aarhus convention, a United Nations Economic Commission for Europe measure, which deals with access to information, public participation in decision making and access to justice in environmental matters. The UK has signed that convention and the Scottish Executive is committed to ratifying it. We took the view that it was sensible to use the freedom of information bill to bring into operation the convention's provisions.

Environmental information regulations will be made under the regulation power that is provided by the bill. The Aarhus convention goes further than the current environmental information regulations and we need to make provision for that. The information commissioner will act as an independent supervisory authority in relation to environmental information regulations. To some

extent, that represents a twin-track approach, but our intention in pursuing it is to find a legislative vehicle for the introduction of measures that will increase the scope for provision of environmental information.

**Nora Radcliffe:** The other point that is made in the Friends of the Earth submission is that the draft freedom of information bill should incorporate article 5 of the Aarhus convention. Apparently however, it mentions only articles 3, 4 and 9. I have not done my homework, but I gained that knowledge from the submission.

**Mr Wallace:** The Freedom of Information Act 2000 does not implement article 5, but that does not bar us from doing so. We are examining the matter. It is fair to say that we have received a substantial number of representations in response to our consultation, and we will scrutinise them.

**Paul Martin:** On requests for information, let us imagine that an inquirer placed a request with the wrong public authority. If the inquirer went to a United Kingdom body for information on devolved matters, would the provisions in the bill be sufficient to ensure that they received guidance on the relevant authority to contact?

**Mr Wallace:** We are proposing to put in place a general duty that would require officials to assist inquirers. If an inquirer went to the Scottish Environment Protection Agency when it would have been more appropriate to contact Scottish Natural Heritage, it would fall within the general duty to assist. Rather than saying, "Sorry, mate. There's nothing here," the duty would be to say that the request should be dealt with by Scottish Natural Heritage. It would not be appropriate to specify such a duty in detail under the bill, but it is important to note that officials will be under a general duty to assist.

By putting such general duties in the bill, I hope that we will foster a culture of openness. Perhaps you ask that question from the perspective of someone used to a culture of secrecy and protectiveness. Such has been the official culture for decades, if not centuries, but we are making an effort to move away from that practice. It might take some time, but I hope that, with the code of practice as well as a general duty in the bill, such problems will not arise.

**Paul Martin:** The draft bill places a duty on public authorities to provide reasonable advice and assistance to freedom of information inquirers. What does "reasonable" mean?

**Mr Wallace:** I have given one example. The duty is set out under section 15. It links to section 59, which deals with the code of practice. We are obliged to bring the code of practice before Parliament, which will deal with a number of specific points. It is always difficult to pin down an absolute definition of what is or is not reasonable. The obligation on Scottish public authorities to give assistance is fleshed out in the bill. Section 59(2) sets out the matters that the code of practice must relate to, such as

"provision of advice and assistance",

the transfer of requests from one authority to another, and

"consultation with persons to whom information requested relates or with persons whose interests are likely to be affected by the disclosure … inclusion in contracts entered into by the authorities of terms relating to the disclosure of information … the provision by the authorities of procedures for dealing with complaints about the handling by the authorities of requests for information."

Parliament will have the opportunity to consider the code of practice. I hope that the general question about reasonableness will be addressed by some of the detailed provisions in the code.

**Paul Martin:** Section 35 deals with confidentiality. What is the section intended to achieve?

**Mr Wallace:** At the moment, common-law rules that have been developed by the courts over many years exist to cover confidentiality of communications. We do not intend to disturb those common-law rules. Equally, we do not intend that those common-law rules should protect authorities against disclosure of information simply on the ground that the information is embarrassing. Where contracts that have confidentiality clauses have been entered into, those should be recognised except in extreme circumstances. At the moment, in limited circumstances, the courts will breach confidentiality clauses. However, our intention is to protect the current position.

In other cases that are not covered by a contract, including between patients and doctors and clients and solicitors, the nexus that is formed by the nature of the relationship means that there is an obligation of confidentiality between the parties. We intend to preserve that with the code of practice.

I referred previously to the code of conduct having specific regard to

"the inclusion in contracts entered into by the authorities of terms relating to the disclosure of information."

When public authorities enter into contracts, we want to ensure that confidentiality clauses are inserted only in cases of strict necessity.

**The Convener:** I have a supplementary question about section 35(2), which gives public authorities absolute exemption if disclosure of information received from another person or authority

"would constitute a breach of confidence actionable by that person or any other person."

Will the minister expand on what breaches of confidence are actionable?

**Mr Wallace:** We have attempted, in section 35, to replicate the law in relation to confidentiality. If I was about to go into print to publicise something about which the convener and I had a contractual arrangement, the convener could go to court and get an interdict against my publishing the information that was confidential. There might also be cases in which, if the information was published, because of a breach of contract, an action for damages would result.

**The Convener:** The point that I am trying to make, minister, is that I do not know what I could tell you in confidence and then sue you for disclosing.

**Mr Wallace:** You would know that because if you and I had entered into a contract, that information would be a term of the contract. Breach of contract is one category. The other category is where breach of confidence would apply. An example of that would be where the duty of confidence arises by implication. If the convener were a doctor, he would know that that applied to information that he received from me if I were a patient. In many respects, that example does not relate to freedom of information. As I said, we are attempting to replicate the law in relation to confidentiality as it exists. At the moment, we manage to go about our daily lives without worrying whether someone is about to sue us for breach of confidence.

The context of freedom of information would arise for the person who was considering disclosure. If a request for information was made, the person who was considering disclosure would need to consider whether disclosure of information could be actionable. If the convener was defined as representing a public authority under the terms of the bill, and he had been invited to release information, he would be well advised to ensure that he took proper advice, if there were question marks about the information.

**The Convener:** It strikes me that some of the examples that the minister comes up with are covered elsewhere. One example is the doctor-patient relationship. If the doctor is employed by the health board, I presume that that relationship is covered by the law that relates to health records. The most likely example to be covered by section 35 would be contracts that have been entered into by a council. Those are often matters in which the public is likely to want information and in which a contractor has deliberately written in confidentiality clauses.

11:45

**Mr Wallace:** We recognise that there could be an attempt to subvert or get round the legislation. It is not intended that section 35 should protect authorities from disclosing information simply on the grounds that it might be embarrassing, uncomfortable or awkward to have that information in the public domain.

We will make it clear in the guidance to public authorities that a duty of confidentiality should be included in contracts only if that is strictly necessary. The United Kingdom Government has already issued such guidance. Let me ask my officials whether I am right to say that such matters could also go to the commissioner.—[*Interruption.*] No—a matter of absolute confidentiality probably could not go to the commissioner, but our guidance will make it clear that such matters must be kept to a minimum. The purpose of section 35 is not to suggest, to the courts for example, that the current common-law rules on confidentiality should be altered.

**The Convener:** Some of us might have concerns about that, because even now we often come up against a barrier, with ministers and officials telling us that certain information is commercially confidential, and that it cannot therefore be given to us.

**Mr Wallace:** That issue features not only in our proposals, but in all freedom of information regimes, and must be addressed. We will take into account the representations that we receive, but I am trying to explain the policy that we pursued when we inserted section 35 into the draft bill. We want to preserve the existing position, but there is an important qualification to that point; we do not intend that section 35 should be used as a protective shield by public authorities that wish to avoid embarrassment. The clear guidance that will be issued will state that confidentiality clauses should be used only in cases of strict necessity.

**Paul Martin:** On the issue of requests for further information, how detailed will the authorities' publication schemes be in order for them to meet the requirements and intended purpose of the legislation?

**Mr Wallace:** That is why we are going to have an information commissioner—the commissioner's duties will include giving advice and promoting good practice. I hope that the publication schemes will be extensive and full. I want an instinctive reaction to develop, through which authorities will put information into the public domain. That will not happen overnight, but I hope that it will happen over a short, rather than long, period. In such circumstances, it would not be necessary for people to apply for information because, by and large, that information will already be public.

We will examine the codes of practice and what is happening at present. I am advised that this

summer, the UK information commissioner will consult on publication schemes. We will not try to reinvent the wheel—if good ideas come from that consultation exercise, we will borrow them. It is not necessary to legislate before encouraging good practice in relation to making information public.

**Nora Radcliffe:** That leads on to my questions, which are on the development of a culture of openness in which information is made freely available.

Would there be a benefit in including a purpose clause in the bill?

**Mr Wallace:** I want to make it clear that we have left that question open and that we will consider it further. I discussed that issue when I was in New Zealand and the New Zealand information commissioner—or the Office of the Ombudsman, which deals with freedom of information—felt that it had considerable merit, as it gave a kind of timelessness to the legislation. However, there is a difference of construction between the New Zealand legislation and our legislation, which is also a relevant factor.

Section 1(1) of the draft bill establishes the following right:

"A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority."

It is arguable that that is the most concise purpose clause that is possible. However, we will have regard to representations that we receive during the consultation on the merits of including a purpose clause in the bill. I have left the door open for further consideration of that.

**Nora Radcliffe:** What difficulties do you perceive in seeking to achieve that cultural change? Do you have concerns about the extent to which that aim can be achieved under the proposed regime?

**Mr Wallace:** I suppose that tradition is one possible difficulty, although it is fair to say that things are changing. I do not accept that it is impossible to change the culture, although the present culture has been built up over many generations. Changing it will therefore take time. Training will be important, as will awareness and leading from the front. That is why, as I said, we have established a working group at official level that is examining the various implications—[*Interruption.*] I am told that the working group's next meeting will be on Friday and that the group's papers are on the website. That is an example of freedom of information.

I visited the Republic of Ireland and met the minister responsible for freedom of information, Martin Cullen, and the Irish information commissioner. What impressed me most was the extent to which training was given before the statute was phased in. We may wish to consider phasing in our legislation if, by doing so, we can ensure that public authorities are properly geared up and that their staff are properly trained. I set a lot of store by training.

**Nora Radcliffe:** What mechanisms do you envisage need to be in place? You mentioned training, which is probably such a mechanism, and phasing in the legislation.

**Mr Wallace:** A sub-group of the working group has been, or is about to be, established with a specific remit for training.

**Nora Radcliffe:** Do you envisage any other mechanisms that might be needed? Who will be responsible for ensuring that those mechanisms are put in place? Will the commissioner have a role in that part of the process?

**Mr Wallace:** The working group will consider a range of issues, including ensuring that record keeping is in good shape, which was mentioned earlier. Record keeping and training are both important.

A number of issues will emerge as we try properly to gear up public authorities. Ultimately, all ministers must share responsibility for trying to ensure that a culture of openness pervades. While I am responsible for the legislation, I sometimes find that freedom of information issues end up on my desk when they arise. However, we want to achieve a culture in which a freedom of information issue that is related to health will end up on Susan Deacon's desk, or on Jack McConnell's desk if the matter is related to education. We must all take responsibility for promoting that culture.

The Scottish information commissioner will have a key role to play, not just in determining appeals or overseeing publication schemes, but in promoting a culture of openness.

**Nora Radcliffe:** You mentioned Ireland and New Zealand. Will you expand on the lessons that can be learned from international experience of introducing freedom of information regimes?

**Mr Wallace:** I mentioned Ireland and New Zealand because I visited them. However, when we drafted our original proposals, we considered other examples, such as the Canadian and Australian regimes. We have borrowed, or adapted, the ministerial override from New Zealand.

We believe that we have produced proposals that are appropriate to and suitable for Scotland. We have not used any other country's system lock, stock and barrel; we have tried to identify and adapt good practice where such practice is relevant. I believe that our proposed system meets

Scottish needs. For example, I mentioned that the working group will meet on Friday this week. The head of the Irish freedom of information unit will attend that meeting and will share experience.

**Nora Radcliffe:** That is good to hear.

**Phil Gallie:** I will continue on the minister's international experiences. What do people in other countries do about information that comes from their equivalents of our Crown Office and Procurator Fiscal Service? The proposed bill appears to lack provisions on what we will do with information from our Crown Office and Procurator Fiscal Service. That causes concern among many people.

**Mr Wallace:** Most freedom of information regimes must tackle information that is gathered during criminal investigations. In any regime that we devise, we do not want a system that might deter witnesses from coming forward and giving information. The Crown Office will be covered by our freedom of information regime. The committee might wish to ask the law officers to give information on that, because it is their responsibility.

An important element of that is that the Scotland Act 1998 guarantees the Lord Advocate's independence. We have had to acknowledge that in drafting the freedom of information provisions. It is important to state that the Crown Office will have a statutory duty to comply with the provisions, which include positive obligations to publish some information. It will also be incumbent on the law officers to publish information within set periods. However, the important difference is that in some categories of information that relate to the Lord Advocate's responsibilities on prosecution, an appeal to the commissioner will not be available. That is because it is felt—self-evidently—that that could compromise the Lord Advocate's statutory independence, in which it is beyond the Parliament's competence through the Scotland Act 1998 to interfere.

**Phil Gallie:** I suspect that we will return to that issue.

**Mr Wallace:** Yes. The issue is important. I have no doubt that the law officers will be only too willing to assist the committee on it.

**Phil Gallie:** Has the Executive assessed the cost implications of the freedom of information proposals?

**Mr Wallace:** We have certainly tried and we continue to examine the implications. We have considered some overseas experiences, but as I said to Nora Radcliffe, we have not adopted one system lock, stock and barrel over another, so it is difficult to make direct comparisons. When we published "An Open Scotland", the original consultation document, we took a view that the cost would be roughly 10 per cent of the £6.5 million that the UK Government had set aside for its information commissioner. We have not significantly revised that estimate. The Irish commissioner has a budget of about £300,000 a year, but commentators have suggested that some overload is being felt there. The proposed 10 per cent of £6.5 million is more than double the amount that the Irish commissioner has. We have factored in the fact that we will have a freedom of information commissioner to future budgeting and to the spending review.

The implications will depend to some extent on what we do about costs. No accurate amount has been identified, but I hope that I have given the committee some of the estimates. Of course, establishment costs will also be incurred. Page 10 of the consultation document with the draft bill states:

"we estimate that between 7,500 and 10,000 requests might be received … If the average cost of dealing with these … was assumed to be between £100 and £300 … the estimated gross cost … would be in the region of £2.5 million to £4.8 million".

That cost would cover everything, including establishing the office, paying for the office and the internal reviews. However, as I said, many requests would cost less than £100. We do not yet have a clear estimate of the cost, but we expect it to be up to about £5 million.

**Phil Gallie:** I am sure that you are fully aware that we are examining the Scottish budget. I went through the document and saw no reference to the additional burdens of freedom of information. Should you take that up with Angus MacKay, the Minister for Finance and Local Government?

**Mr Wallace:** From memory—I will write to the committee if I am wrong—I think that a miscellaneous provision deals with that. I am not sure whether my official, Mr Lugton, can help me with the question. The Scottish Executive has made no additional provision for other public authorities, but the money for the commissioner has been included in the budget document. I will clarify that in writing.

12:00

**Phil Gallie:** Thank you. However, the fact is that the cost of the commissioner is probably relatively low compared to the burdens on local authorities and the block grants. The amount for the commissioner could be relatively low even compared to the burden on bodies in the national health service and other such facilities. You might want to revisit those cost implications, because the costs extend across the range of public services.

**Mr Wallace:** We are not having a standing start.

Phil Gallie must bear it in mind that many public authorities already fulfil requests for information. The great imponderable—which is why it is impossible to answer the question—is the extent to which we will drive demand by adopting legislation. The more people make requests, the greater the cost will be.

I emphasise that, as I have said during the morning, I hope that we will reach a stage at which people will not find it so necessary to make requests, because the information that they want will be in the public domain. Therefore, much importance will be attached to the publication schemes that are prepared and the information commissioner's oversight of them. The guidance that the commissioner can give and the codes of practice will lead to more information being released proactively into the public domain. That will have some cost, but it might more than counterbalance the other costs—or be cost effective—if it means that fewer requests are made.

**Phil Gallie:** I accept that point. I accept your argument about people asking questions, but answering questions and publishing information could place an additional burden on local authorities in archiving, publication schemes, training staff and special needs. All such requirements could place an additional burden on local authorities. It would be important to try to identify those costs, so that people know where we are and so that our Scottish budget can be constructed properly.

**Mr Wallace:** I hear what Phil Gallie is saying and I understand full well the point that he makes. We have not made extra funds available, because we recognise that public authorities already handle requests for information. Information is routinely published. No additional funds were made available to public bodies in Ireland to implement freedom of information there. As I understand it, no additional funds have been made available in the United Kingdom for the regime that the Freedom of Information Act 2000 introduced.

By and large, procedures are in place for handling many requests for information. Any increase is likely to be minimal. We will have to monitor that issue, but given other experiences and the present situation, we are not beginning from a standing start. Requests for information are already met, so we have not budgeted for additional funds to be made available to public authorities.

**The Convener:** Section 51 of the draft bill would give ministers the ability to override a decision of the information commissioner. If I am correct that means that, if an authority refused to give information, which the information commissioner then said should be given out, a minister could override the commissioner's decision. What is the thinking behind that?

**Mr Wallace:** If the information commissioner said that the public interest favours disclosure, there would be only a limited number of categories in which ministers could override that and take the view that the public interest in non-disclosure outweighs the interest of disclosure.

I cannot conjure up an example of when the ministerial override would be used because in New Zealand, whence we borrowed the provision—as I said in my answer to Nora Radcliffe—the ministerial override has never been used since 1987. In the five years of New Zealand's freedom of information law prior to 1987, individual ministers could override the information commissioner's decision. I shall not say that that happened frequently, but it was thought to be happening too frequently for the regime to work comfortably. That is why New Zealand moved to collective decision-making on whether the commissioner's decision could be overridden. Since then, the override has never been used. Indeed, the New Zealand Minister of Justice told me that it is almost a matter of pride among ministers that they get freedom of information cases off their desks and try their best to answer them.

Other freedom of information regimes, including that of the United Kingdom, have a ministerial veto. What is special about our proposed veto is that it would be limited in extent and it would have to be exercised collectively. Other than that, the commissioner would have the power to require disclosure. A certificate would need to be laid before Parliament that gave the reasons for the decision to override the commissioner. That would be a major political event, so the power would not be used lightly; it would be used only when the collective view of ministers was that the commissioner's decision on what was in the public interest was not the right one.

**The Convener:** You cite the fact that there is a similar provision elsewhere, but it hardly surprises us that ministers elsewhere have sought to keep powers that allow them to prevent information getting into the public domain. That is the whole reason for having a freedom of information bill. It seems a bit bizarre that the only argument in favour of the power is that ministers will not use it.

**Mr Wallace:** I did not say that we would never use the power; I said that it exists as a backstop. Other freedom of information regimes that are held up as models of great openness, such as those in Ireland and New Zealand, have such a backstop power. The potential for the application of the power is very limited indeed because the decision would need to be made collectively by ministers and would have to be notified to Parliament.

Section 51(3) of the draft bill requires that the reasons for which the opinion was formed would have to be given.

Given that in almost every freedom of information regime some residual power is reserved to ministers, our proposed regime would be one of the most limited as regards the ministerial power to override the information commissioner's decisions. Freedom of information would be buttressed in so many ways that the scales would be unequivocally tipped in favour of openness. Only in the most extreme circumstances would ministers wish to use that power to override.

**The Convener:** Many people will find it a bit strange that you will set up an office of the commissioner, who will be the guardian of the public's right to know, but then give ministers the ability to override the commissioner's decisions. If people were asked in an opinion poll whether they would trust the commissioner or ministers more, I suspect that we know what answer we would get.

**Mr Wallace:** At the end of the day, ministers are accountable to the Parliament. We would be held to account for the decisions that we made. We should also take that into account.

In Ireland, ministers can exercise their veto before the commissioner ever gets to the point of making a decision. That is more restrictive than our proposal, because in Scotland we will at least have had the benefit of knowing that the commissioner found in favour of disclosure. Ireland is often held up as a model that we ought to follow, but a case in which Irish ministers exercised their veto would never even get to the commissioner.

We are doing things that decisively move us in a direction of far greater openness. The draft bill sets out the very limited circumstances in which that backstop or safeguard could be used if ministers' view on what was in the public interest differed from that of the commissioner. We would need to give reasons for such a decision and we could be readily held to account for it.

**The Convener:** We can have one more supplementary question before we finish this item.

**Phil Gallie:** The minister mentioned ministerial accountability and how he would wish to retain a veto over freedom of information, yet later today in the stage 3 debate on the Convention Rights (Compliance) (Scotland) Bill, he will be giving away ministerial responsibility on another veto—

**The Convener:** Hang on, Phil. That is nothing to do with the draft freedom of information bill.

**Phil Gallie:** It is. It is a contrast or difference in Government policy. The minister is advocating one thing in the draft freedom of information bill, but in another bill he is going in a different direction. I suggest that the question is fair.

**The Convener:** No.

**Mr Wallace:** I will not complain about the fairness of the question. It is a good debating point, but it is to compare apples with pears.

# Petition

**The Convener:** I believe that the minister will stay with us for item 6, which concerns petition PE265 from the UK Men's Movement.

The petition calls on the Scottish Parliament to protect innocent men against false rape allegations by granting anonymity to those who have been accused. It also calls on the Parliament to introduce a new crime of false rape allegation, to create a register of false rape accusers and to publish annually a study on all rape cases including false rape allegations.

We have taken a fair bit of evidence on the petition. Has the minister had a chance to review that evidence? Have you come to any views?

**Mr Wallace:** I have a copy of the petition and a copy of the exchanges from the committee. I do not have all the detail, but I am prepared to try to answer your questions. I have seen some of Mr McAulay's correspondence.

**The Convener:** Have you formed any views on the suggestions that have been made? The Law Society of Scotland said that consideration could also be given to extending the right to anonymity until the termination of the appeal process. It suggested that the trial judge could be given discretion to continue the anonymity of the accused upon cause being shown by either party. Other organisations are totally against the idea of giving the accused person anonymity unless it is to protect the victim. What is your view on that?

**Mr Wallace:** It is perhaps best to make clear at the outset that—except in proceedings that involve children—there is no provision that protects the alleged victim of rape from being publicly identified in criminal proceedings. It has been done by convention. Judges have the power to clear the court for trials of rape. I know that the newspaper editors take seriously their responsibility not to disclose a victim's identity, but that is done on a basis of convention rather than legislation. The petition therefore asks the Parliament to go beyond the position in law at the moment.

I can understand where the petitioners are coming from. Being subjected to the processes of the criminal justice system cannot be a particularly happy experience, but it is important to consider the matter in the context of the whole system. Prosecutions are brought only if there is a sufficiency of evidence and if, in the view of the Lord Advocate, it is in the public interest to do so. There are therefore already safeguards against a false accusation getting as far as a trial. That does not mean to say that that could never happen, but it is important to remember that those safeguards exist.

It is also important that we have a system of open justice. If we were to grant the accused in one category of crime anonymity, that could lead to anonymity in other categories too. Where, then, would we draw the line? Being accused of murder is also serious. Would we extend anonymity so broadly that we started to undermine the concept of open justice?

12:15

**Gordon Jackson:** For the avoidance of doubt, I state that I do not pretend to have a fixed view on the matter. My questions are to tease out the situation. Although I do not have a fixed view, I do have some difficulties on which your comments would be helpful.

You mentioned that the anonymity of the alleged victim in rape cases is convention, not law. I suggest that that does not matter tuppence, because it happens. If the convention started to be broken, we can be pretty sure that members would put you under serious pressure to turn it into law: there would be strong pressure on you not to allow victims or alleged victims to be named.

My difficulty is with the argument, which I have heard put in the chamber, that there is no justification for anonymity to apply to those accused of rape and not to other classes of accused. The answer might be, why should it apply to that class of complainer and not to others? The reason is that rape is a unique kind of crime; sexual behaviour and rape are thought to be a unique area. In cases of murder or attempted murder, we do not normally give the complainers anonymity.

The petitioners' argument seems to be that if being the victim of rape is uniquely serious, or unique in other ways, being accused of rape is equally uniquely serious. How can we say that for one side of the equation anonymity should apply only to a certain kind of case and, for the other, ask why it should not apply to everything?

**Mr Wallace:** There are a number of reasons why anonymity is given to rape victims and I am sure that they have been well rehearsed in the committee. For a start, it is believed that anonymity makes giving evidence less distressing for a victim. If the victim is making an allegation of something that by its nature was unpleasant, anonymity protects them from having a public association with those events. There may even be cases in which the reasons for anonymity relate to safety.

However, one of the most important reasons is that the anonymity of rape victims goes a long way to encourage victims to come forward. I will put it the other way round: the absence of anonymity would do a lot to deter other victims of rape from

coming forward. The advantage of anonymity is that it is intended to encourage victims of rape to report an offence that they might not otherwise be minded to report.

There is a distinction between the victim of an alleged offence and the alleged perpetrator: the victim is not the one who is on trial. The view is that if a victim's name is given out in a rape trial, that could in many respects amount to the trial of the victim. The person who is on trial is in a different position.

Trials are not brought lightly. A number of safeguards for the rights of the accused are built into our criminal justice system. They would not necessarily be available to the victim if she were in a position that was tantamount to being put on trial because her name was being mentioned.

**Gordon Jackson:** I suspect that, on balance, I could go along with all that, but I will just quote some evidence that we have from Ireland. You have been quoting Ireland all morning. It still has anonymity for persons accused of rape. The English have done away with it. The Irish still have it because

"it was considered that in the case of an allegation of rape an unscrupulous complainant could hide behind the anonymity provision while destroying the character of an innocent person if anonymity were not also granted to the accused unless and until found guilty".

All of us who work in the field or who have constituents who have been accused have, on occasions, felt some sympathy for people who are charged with offences and have had their names made public. I know that Phil Gallie has examples from Ayr of rather sad cases. Is there any case for, not a law, but some discretion on anonymity? Is there any case for a halfway house to protect those who should be protected while not protecting those who should not be? It is difficult to get that balance.

**Mr Wallace:** On so many things, striking the right balance is always the real challenge. I will stand corrected if you tell me that the evidence and information that you have contradicts our view, but we in the justice department are not persuaded that there is a widespread problem of false allegation. False allegation seems to be the premise on which much of the petition proceeds. Let us remember that false allegations are also criminal. We are not persuaded that the mischief of false allegation exists to any serious degree.

Much of the argument comes back to the fact that if we are to have an open system of justice, it should be made public that a person is on trial for rape, as happens with other crimes. I think that I am right in saying that in the case of a father accused of raping his child, the accused would be anonymous if disclosing his name would identify the victim. Correct me if I am wrong, but I think that, in such circumstances, degrees of anonymity are available.

**Gordon Jackson:** What worries me is the danger of double standards. You said that there are not many false allegations. I totally accept that. I do not for a minute suggest that because there are hundreds of rape acquittals there are hundreds of false allegations. That would be foolish, but what if there is just one false allegation? When you were proposing to change the law not to allow the accused to cross-examine the complainer, the argument against the proposal was that such cross-examination hardly ever happens. The justice department point, quite rightly, was: what if it happens once? It does not matter whether the practice is widespread; if one person has to suffer, we should change the law.

In the case of cross-examination, we were changing the law for something that in no view is widespread. The number of times a complainer needs to be protected from cross-examination is once every five years. My difficulty is that we are moving to a double standard: if something happens once, that is once too often, but on false allegation the argument is that it does not happen often so it is not important.

**Mr Wallace:** The phrase "double standard" tends to have pejorative connotations, but in many respects there are different standards because different standards apply to the person who is accused and the person who is a victim. As I said earlier, the accused is not put on trial lightly. He is put on trial only because the Crown believes that there is a sufficiency of evidence, in which questions of credibility—no doubt Gordon Jackson is more experienced in that than anyone else who is at the meeting—are clearly involved, and because the Crown has taken the decision that it is in the public interest to prosecute. That puts the accused in a different position from the alleged victim.

It is no small matter to take into account the public policy consideration of what it would mean for deterrence if the victim's name were released. The same consideration applies to cross-examination. The hostile cross-examination of a victim by an accused person could have ramifications for other cases. If a false allegation is made, the position is different. As I have already indicated, a false allegation is a criminal matter.

**Phil Gallie:** I go along with everything Gordon Jackson said. He made some very apt points. When he spoke about double standards, I suspect that he was referring to the frequency of cross-examination of victims by the accused.

**Mr Wallace:** There was hostile cross-examination of the victim by the accused in a case

that was heard this time last year. That case received huge publicity. There are concerns that women who have been raped or abused may be deterred from coming forward. It is difficult to see how the disclosure of an accused person's name might lead to a raft of false accusations.

**Phil Gallie:** I accept your point. It is important and I have some sympathy with that view, as well as with the idea of anonymity for the accused.

You said that charges are not brought lightly. Maureen Macmillan has demonstrated time and again that there are many cases in which people feel that rape charges should be brought but they are not. The victims must be under intense pressure. We do not know this, but one of the factors that procurators or the Crown Office take into account when considering whether to bring rape charges may be the effect on the individual who is charged. This proposed provision might ensure that more cases are brought and that there are more convictions. Once someone has been convicted, their name should be released. The release of the name of someone who has been charged with an offence—it applies not only to murder—carries a stigma that can have a traumatic effect on families and children. Perhaps the minister should consider that issue.

**Mr Wallace:** If the offence relates to a child—

**Phil Gallie:** It might be a child from a different family.

**Mr Wallace:** The accused would not be identified if that meant the child also would be identified. It would not be appropriate for me to comment on the criteria that the Crown Office uses when considering whether to bring a prosecution. I cannot say whether the effect on the individual who is charged is a factor. That question would be better addressed to the Lord Advocate or the Solicitor General.

**The Convener:** I thank the minister for his attendance.

We have given the issues raised in this petition a fair hearing. I do not think that the committee can take it any further, but I am open to contradiction on that.

**Phil Gallie:** The committee has had the chance to examine the information that has been brought before it. I still have a great deal of sympathy for the idea of anonymity for the accused, but I would be happy for the petition's other suggestions to be dropped. I certainly do not support one of the ideas that I am supposed to have endorsed.

We have argued about the issue of anonymity and may have set views on what is fair and proper. It would be appropriate for the committee to take a view on that issue, perhaps by voting on it.

**The Convener:** I do not think that we would reach a unanimous view on that. Nor am I sure that all of us want to take a decision on the issue at this stage. I certainly do not want to introduce a committee bill to change the current legislation. I am not sure how our voting on a loosely worded motion cobbled together on the back of an envelope would contribute to the debate on this serious issue.

**Phil Gallie:** There is some wisdom in that comment. In your letter to the convener of the Public Petitions Committee, you might indicate that members of this committee have some sympathy for the petition's call for anonymity for the accused in rape cases.

12:30

**Gordon Jackson:** I am happy to make my position clear. I understand why the petition is calling for the accused in such cases to remain anonymous. There have been occasions when I have felt that it is unfair that a person's name is bandied about all over the place, but I do not know how to deal with that problem. Passing a law that stipulates that the accused should remain anonymous in every case would be going too far in the other direction. I am on the minister's side, but I also sympathise with the petition. I would be happy for that to be expressed.

**The Convener:** I will inform the Public Petitions Committee that we understand why this petition has been submitted but will take no further action on it. We have allowed the issues that it raises to be aired in a public forum.

**Maureen Macmillan (Highlands and Islands) (Lab):** We can make a distinction in our response. When people such as teachers or policemen are accused of abusing children, that can ruin their careers and put their lives in jeopardy. I understand the concerns about the way in which rape cases are reported in the press. It would help the accused if we could get the press not to make a meal of every case that comes along.

**The Convener:** We now have that clear.

This meeting will be followed by a joint meeting with the Justice 2 Committee. The next meeting of the Justice 1 Committee is on Tuesday 5 June, in the afternoon.

**Gordon Jackson:** Oh no.

**The Convener:** Members who have difficulty getting here first thing in the morning should be glad of that. At our meeting on 5 June we will take evidence from the Scottish legal services ombudsman on the regulation of the legal profession and from a representative of the Northern Ireland Human Rights Commission. We will also deal with another petition.

**Phil Gallie:** I apologise now for the fact that I will be unable to attend that meeting.

**The Convener:** That is noted.

**Gordon Jackson:** Hope springs eternal in the human breast.

**The Convener:** We will take a short break and start our joint meeting with the Justice 2 Committee at 12:40.

*Meeting closed at 12:32.*

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